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Supreme Court of the United States

OCTOBER TERM, 1943

CAROLENE PRODUCTS COMPANY, a corporation, CHARLES HAUSER and WILLIAM H. HARTKE, Petitioners,

against

UNITED STATES OF AMERICA, Respondent.

No. [redacted] 2

PETITIONERS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

I.

Constitutionality.

In 1923, when Congress passed the Act, the term "filled milk" was used to denote a skim-milk product, irremediably deficient in vitamins A and D. As the Government admits (Brief p. 8):

> "Congress was unaware, of course, that vitamins lost through removal of the butter fat from milk might conceivably be artificially replaced."

This irremediable vitamin deficiency was "the rationale" of the Act (*U. S.* v. *Carolene*, 304 U. S. 144, 152).

The Government does not question the applicability of the cases cited in our principal brief (pp. 15-16) to the effect that

> "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."

On this principle, petitioners sought to show that what Congress believed impossible in 1923, science has since made possible: that vitamins lost through the removal of butter fat from milk can now be artificially replaced, and that they are so replaced in Carolene, with the result that Carolene is not only not deficient in vitamins, but contains them in quantities as great as, if not greater than, they exist in whole milk; and that Carolene is one of the ten most nutritious food products known.

The learned Trial Court refused to permit petitioners to introduce any such evidence.

The Government now recognizes (Brief, p. 13) that petitioners were entitled to prove these facts, and attempts to justify the Court's ruling by asserting that the evidence offered "fell short" of establishing them (Brief, p. 13).

Here, we submit, is a serious fallacy in the Government's argument.

Whether or not evidence should be received, is one thing: whether or not it is sufficient to establish the fact sought to be proved thereby, is quite another. The Court's refusal to *receive* competent, relevant and material evidence cannot be justified by the assertion of counsel that, had it been received, it would have been insufficient to establish the facts sought to be proved thereby.

Had the Court received the evidence and, after giving it due consideration, found that it "fell short" of establishing the facts sought to be proved thereby, the point we are now discussing would not be in the case. But that is not what happened: as the Government accurately states (Brief, p. 13), the Court "*rejected*" the evidence— *refused to receive or consider it* (R. 44-5).

Thus, though the Government admits that the evidence was relevant and material to a vital issue in the case, petitioners were not permitted to introduce it: they were denied a trial of the issue which would have been created thereby, and have been cast in judgment without their day

in Court on that issue. This, we submit, was highly prejudicial to petitioners, and would require a reversal of the judgment.

Much of the Government's brief is based on statements of this Court in *U. S.* v. *Carolene*, 304 U. S. 144. Thus, there is quoted at length (Brief, pp. 9-10) the portion of the opinion in which the Court stated that the product was an "inferior" one, from which the vitamins had been "abstracted"; that vegetable oils could not supply the deficiency so created, and that the omission resulted in undernourishment and the diseases incident thereto.

These statements in the opinion in the earlier case referred to the former—the vitamin-deficient—product, which, by the demurrer there interposed, was admitted to be "an adulterated article of food, injurious to the public health"; they are inapplicable to the present—the vitamin-fortified—product, which is as rich, if not richer, in vitamins, and as nutritious, if not more so, as whole milk.

In sustaining the constitutionality of the Act against the challenge based on the demurrer in that case, this Court was at pains to observe that if at any time there should arise a case to which the "rational basis" for the Act was inapplicable, that fact could be shown in defense of any prosecution under the Act (304 U. S. at pages 153 and 155). This is the very fact petitioners sought to prove in the District Court, but proof of which the learned Court declined to receive.

Highly significant is the omission from the Government's brief of any reference to *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, discussed at pages 24 and 25 of our principal brief. The *Weaver* case points up the distinction between the power of Congress when dealing with a nutritious product and its power when dealing with a deleterious one. The *Weaver* case, we submit, establishes that Congress may regulate, but it may not prohibit, the shipment of a nutritious product.

While ignoring completely the *Weaver* case, the Government maintains (Brief, pp. 13-14) that although a product contains no deleterious substance, and though it be truthfully labeled, it may be banned from interstate commerce, citing the cases of *McCray* (195 U. S. 27), *Capital City* (183 U. S. 283), *Kentucky Whip* (299 U. S. 344) and *Hebe* (248 U. S. 97). None of these cases stands for the proposition for which it has been cited.

The *McCray* case sustained the right of Congress to tax artificially colored oleomargarine, even though artificially colored butter was not taxed. The *Capital City* case held that where a state found that oleomargarine could be harmful, it could prohibit the sale of oleomargarine artificially colored to resemble butter. The *Kentucky Whip* case sustained the right of Congress to prohibit the shipment of convict-made goods into a state which had found traffic in such goods to be harmful and had therefore prohibited it. The *Hebe* case has already been discussed (our principal brief, p. 25).

These cases do not stand for the proposition that shipment of a nutritious product may be banned.

Despite the Government's recognition of the right of one indicted under the Act to show that the Act does not apply to him because his product is not within the "rational basis" of the Act (brief, p. 13), the Government elsewhere makes the contradictory statement (brief, pp. 11-12) that petitioner's remedy "would seem" to be exclusively with Congress. The "would seem" is strikingly significant; it makes it clear that even the Government is none too sure of its position. Certainly the cases which it cites to support this weak statement are slender reeds. Thus, the *Carolene* case reported in 104 F. (2) 969, dealt with the vitamin deficient product, as compounded prior to the discovery of the fortification process. In the *Hangahan* case (291 Ky. 417) the court held

that the decision of this court in *U. S.* v. *Carolene* (304 U. S. 144) was "conclusive" upon it on the question of constitutionality, evidently oblivious of the fact that *U. S. v. Carolene* had involved the vitamin-deficient product, and arose on a demurrer which admitted that the product there involved was adulterated and injurious to the public health. The *Sage case* (157 Kan. 404) is a four to three decision, on which a petition for certiorari is now pending in this court (No. 745, this Term).

The Circuit Court of Appeals frankly stated in its opinion, (R. 290-1) that

> "the inclusion of Carolene within the ambit of the statute leads to a seemingly harsh and inequitable result * * *".

It is difficult to understand why the Court felt powerless to prevent such an injustice. The result is "harsh and inequitable" only because Carolene is a nutritious product, fairly labeled and sold, and not one of the character which Congress intended to ban. In such circumstances the Court should have held that Carolene is

> "not within the statute, because not within its spirit, nor within the intention of its makers,"

and thereby prevented the "harsh and equitable result." That, we respectfully submit, is what Courts are for, particularly in a case where the failure to prevent it will result in the imprisonment of two highly reputable and useful citizens.

II.

"Imitation or Semblance."

We note that the Government has made no effort to answer Point II of our principal brief (pp. 21-2), to the effect that Carolene is not "in imitation or semblance" of milk, and, consequently, that the Act does not apply to it.

III.

Liability of the Individual Defendants.

The protection afforded by the constitutional privilege against self-incrimination should not be measured by delicate balancing of evidence. The attrition of efforts to estimate the harm done by particular violations will wear away the constitutional guaranty.

The Government admits (Brief, p. 17) that the constitutional privilege against self-incrimination "normally" protects a defendant from being called upon to testify to "any" facts.

The Government seeks to take this case out of the "normal" by asserting (p. 16) that Hartke was called

> "for the purpose of having (him) identify Government exhibits 1 and 2".

This is hardly a complete statement of the situation. Exhibits 1 and 2 were merely the certificates of incorporation of the Litchfield Company and the Carolene Company; certified copies would have been sufficient without any testimony. The fact is that Hartke was called upon (Government's Brief, p. 16) to disclose, among other things, that he had been

"an original incorporator and continuously associated with the Carolene Products Co."

The significance of this testimony is apparent when it is recalled that in holding the individual defendants liable, the learned Circuit Court of Appeals said (R. 294):

> "In the light of the record of this case, we are inexorably forced to the conclusion that the individual defendants are both *chargeable under the law with knowledge* of the eight specific unlawful shipments by the corporation as set out in the indictment." (Italics ours.)

Except for the testimony elicited from Hartke concerning the long period of his association with Carolene Products Co., there was no evidence, by stipulation or otherwise, on which he could be charged, even by inference, with knowledge of the shipments set out in the indictment.

U. S. v. *Austin-Bagley Corporation*, 31 F. 2d 229 (Government's brief, p. 18) goes no further than to sustain the right of the Government to call a defendant in a criminal case to tell his official position and to identify corporate books. The evidence elicited from Hartke went much further; it put into the record the only evidence upon which he was held chargeable with knowledge of the acts of the corporation in making the shipments here involved.

Even with this evidence, it is submitted, the record is insufficient to sustain a conviction of the individual defendants. The facts upon which the Government relies (Brief, pp. 14-15) are in no respect inconsistent with the innocence of the individual defendants. As we pointed out in our principal brief (p. 27) the Government expressly admits that there is no evidence in the record to

show that either of the individual defendants personally made, or even had any personal knowledge of, the shipments set out in the indictment.

The Government relies (Brief, pp. 15-16) on the *Dotterweich* case, 230 U. S. 277. In that case, this Court, by a five to four decision, held the president and general manager of the corporation criminally liable for introducing into interstate commerce a misbranded drug, in violation of the Food, Drug and Cosmetic Act. It does not appear from the majority opinion whether or not Dotterweich knew of the shipment. The dissenting opinion (p. 286) speaks of the absence of proof or claim that Dotterweich "knew of the introduction into commerce of the adulterated drugs in question", but judging from the opinion of the Circuit Court of Appeals in that case, this reference was to Dotterweich's absence of knowledge *that the shipment contained adulterated matter;* that he knew such shipments were being made is indicated by the fact that he had given instructions for the making of them whenever orders for the product were received (131 F. (2) 500 at p. 501).

There is no comparable evidence here. There is neither proof nor claim that either of the individual defendants gave instructions for the making of any interstate shipments. The Government refers (Brief, p. 15) to the testimony of Sullivan, a Government inspector, to the effect that the individual petitioners gave an employee "instructions to sign bills of lading for Carolene Products Company" (R. 127), but there is no evidence as to what shipments these instructions related to, or that the shipments referred to were to be made between states.

Conclusion.

As the Government properly points out (brief, p. 19) this case "is important".

It is important not only to petitioners and the Government, but to millions of people in this country, who have been using and, if permitted, will use, Carolene because they find it a nutritious food product better suited to their purses than condensed milk or whole milk.

The world is crying for food, particularly for fats. Any legal theory which denies us at this time the benefits of our scientific progress should be supported by compelling reasons. A law passed in a state of scientific ignorance should not blanket an era of discovery. Science has added a wholesome food to our dietary. The product now offered is not the product banned by Congress.

Statutes similar to this one have been passed in many states of the Union and, of course, the courts of those states are influenced in their interpretations of the statutes, and in their determinations as to constitutionality, by the decision of the Federal Court. Whatever may be said as to the strict legal effect thereof, it is inevitable that a denial of certiorari in this case will be treated by the courts throughout the nation as a tacit approval by this court of the decision of the Circuit Court of Appeals.

It is highly desirable that the court of last resort settle the questions here involved in order that an end be put to the diversity of opinions among the courts with reference to these questions. Thus, under existing decisions rendered upon substantially identical statutes, it is illegal to manufacture and sell Carolene in Florida (*Setzer* v. *Mayo*, 9 So. (2) 280), Kentucky (*Carolene Products Co.* v. *Hanrahan*, 164 S. W. (2) 597), Kansas (*Kansas ex rel Mitchell* v. *Sage Stores Co.* (157 Kansas 404), Pennsylvania (*Carolene Products Co.* v. *Harter*, 329 P. 49) and Wisconsin (*State* v. *Emery*, 178 Wisconsin 147), although it is perfectly legal to sell it in Illinois (*People* v. *Carolene Products Co.*, 345 Ill. 166; *Carolene Products Co.* v. *McLaughlin*, 365 Ill. 62), Michigan (*Carolene Products Co.* v. *Thomson*, 276 Mich. 172), Nebraska

(131 Neb. 429) and Missouri. (*State ex rel* v. *McKittrick*, 346 Mo. 1049). Whether it will be held legal or illegal in those states which have not yet passed upon the question will remain a matter of speculation in the absence of an authoritative determination by this Court. This is a most unsatisfactory condition and one which, we believe, should be corrected by a review in this Court.

We respectfully submit, in view of the circumstances set out above, that the petition for a writ of certiorari should be granted.

March 20, 1944.

Respectfully submitted,

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